

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50322; File No. SR-BSE-2004-41)

September 7, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Boston Stock Exchange, Inc. Relating to Fees Applicable to Newly Listed Classes and New Market Maker Positions in Currently Listed Classes on the Boston Options Exchange Facility

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 30, 2004, the Boston Stock Exchange, Inc. (“BSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On September 2, 2004, the Exchange submitted Amendment No. 1 to the proposal.³ The proposed rule change has been filed by the Exchange as establishing or changing a due, fee, or other charge under Section 19(b)(3)(A)(ii) of the Act⁴ and Rule 19b-4(f)(2) thereunder,⁵ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Annah Y. Kim, Chief Regulatory Officer, Boston Options Exchange Regulation, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated September 1, 2004 (“Amendment No. 1”). In Amendment No. 1, the Exchange revised the filing to clarify the text of the proposed rule change.

⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ 17 CFR 240.19b-4(f)(2).

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fee Schedule for the Boston Options Exchange⁶ to allow the Exchange to take into account newly listed classes and new market maker positions in currently listed classes. Newly listed classes are classes not traded by BOX Market Makers on the date new market maker appointments are made in such classes; currently listed classes are classes traded by BOX Market Makers on the date new market maker appointments are made in such classes. The text of the proposed rule change appears below. Proposed new text is in italics and language to be deleted is in brackets.

BOSTON OPTIONS EXCHANGE FACILITY

FEE SCHEDULE

* * * * *

Sec. 3 Market Maker Trading Fees

a. No change.

b. Minimum Activity Charge (“MAC”)

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1. MAC “Levels”

a. For Classes that have been trading on any options exchange for at least six calendar months

The table below provides the MAC for each of the six “categories” of options classes listed by BOX. The category for each class is determined by its total trading volume across all U.S. options exchanges as determined by OCC data. The classifications will be adjusted at least

⁶ <<http://www.bostonoptions.com/pdf/FeeFilingSECOfficial.pdf>> (accessed Sept. 7, 2004).

twice annually (in January and July, based on the average daily volume for the preceding six month period).

| Class Category | OCC average daily volume (# of contracts) | MAC per Market Maker per appointment per month |
|----------------|--|---|
| A | >100,000 | \$15,000 |
| B | 50,000 to 99,999 | \$3,000 |
| C | 25,000 to 49,999 | \$2,000 |
| D | 10,000 to 24,999 | \$750 |
| E | 5,000 to 9,999 | \$250 |
| F | Less than 5,000 | \$100 |

b. For Classes that have been trading for less than six calendar months

A class will not be placed into a MAC category [A MAC will not be applied] until a class has been trading on any options exchange for a full calendar month. After a class has been trading for a full calendar month, the MAC category for such class will be determined, applying the criteria set forth in the table above, based on the average daily volume for such full calendar month across all U.S. options exchanges as determined by OCC data. The classification will be adjusted at the beginning of each new calendar month thereafter based on the average daily trading volume for the previous calendar months in which the options class was traded for the entire month, until the class has been trading for six full calendar months. Thereafter, the classification will be adjusted at least twice annually (in January and July, based on the average daily volume for the preceding six month period) as set forth in subsection 1.a. above. Until an options class is placed in a MAC category, only per contract trade execution fees will apply to trades in that class.

2. MAC “Adjustments”

[The MAC will not be applied during the first three calendar months following launch.]

With respect to market makers appointed to classes traded by BOX Market Makers on the date of such appointment, if the market maker is not already a BOX Market Maker in at least one other

class, the MAC will be applied the earlier of either (i) the date the Market Maker commences quoting the class, or (ii) three months after the date of such appointment. However, if the market maker is already a BOX Market Maker in at least one other class, the MAC will not be applied until the earlier of either (i) the date the Market Maker commences quoting the class, or (ii) the eleventh trading day after the date of such appointment.

With respect to market makers appointed to classes not traded by BOX Market Makers on the date of such appointment, if the market maker is not already a BOX Market Maker in at least one other class, the MAC will be applied the earlier of either (i) the date the Market Maker commences quoting the class, or (ii) three months after the date of such appointment. However, if the market maker is already a BOX Market Maker in at least one other class, the MAC will be applied the date the class is listed on BOX.

Any MAC that becomes applicable on a day other than the first trading day of a calendar month is applied on a pro rata basis based on the number of trading days in that month for which the class was traded on BOX.

Furthermore, the MAC will be “indexed to BOX’s overall market share as determined by OCC clearing volumes. At the beginning of each calendar month, BOX will calculate its market share for the previous month (market share equals total BOX traded volume divided by the total OCC cleared volume for the classes that BOX has listed). If BOX’s overall market share is less than 10%, BOX will reduce the MAC applicable for each Market Maker according to the following table.

| BOX Market Share | MAC Applicable Rate |
|------------------|---------------------|
| 0% to 4.99% | 33.3% |
| 5% to 9.99% | 66.7% |
| 10% and more | full MAC |

These adjustments are subject to subsection 1.b. above.

c. Volume discount on total volume traded across all assigned classes (calculated on monthly basis)

No change.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to allow the Exchange to adjust the application of the minimum activity charge (the "MAC") for newly listed classes and new market maker positions in currently listed classes as follows:

With respect to market makers appointed to classes traded by BOX Market Makers on the date of such appointment, if the market maker is not already a BOX Market Maker in at least one other class, the MAC will be applied the earlier of either (i) the date the Market Maker commences quoting the class, or (ii) three months after the date of such appointment. However, if the market maker is already a BOX Market Maker in at least one other class, the MAC will not be applied until the earlier of either (i) the date the Market Maker commences quoting the class, or (ii) the eleventh trading day after the date of such appointment.

With respect to market makers appointed to classes not traded by BOX Market Makers on the date of such appointment, if the market maker is not already a BOX Market Maker in at least one other class, the MAC will be applied the earlier of either (i) the date the Market Maker commences quoting the class, or (ii) three months after the date of such appointment. However, if the market maker is already a BOX Market Maker in at least one other class, the MAC will be applied the date the class is listed on BOX.

Any MAC that becomes applicable on a day other than the first trading day of a calendar month is applied on a pro rata basis based on the number of trading days in that month for which the class was traded on BOX.

These adjustments are subject to Section 3.b.1.b of the Fee Schedule which provides that until an options class is placed in a MAC category, only per contract trade execution fees will apply to trades in that class.

The purpose of the proposed rule is also to clarify that a class will not be placed into a MAC category until such class has been trading on any options exchange for at least six calendar months.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act⁷ in general, and furthers the objectives of Section 6(b)(4) of the Act⁸ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Exchange members. The Exchange believes that it is appropriate to adjust the application of the MAC for certain newly created market maker positions in order to avoid applying a minimum trading fee before the market maker has commenced trading. However, with respect to newly listed classes,

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4).

market makers who already have experience trading on BOX are expected to commence trading on the date the class is listed on BOX.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act⁹ and subparagraph (f)(2) of Rule 19b-4 thereunder¹⁰ because it changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 17 CFR 240.19b-4(f)(2).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BSE-2004-41 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-BSE-2004-41. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that

you wish to make available publicly. All submissions should refer to File Number SR-BSE-2004-41 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).